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No. 89-456

Supreme Court, Ala.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

VINTAGE ENTERPRISES, INC.,
Debtor In Possession,
Petitioner,

vs.

WAYNE JAYE and CAROLYN JAYE,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

**BRIEF OF RESPONDENTS WAYNE JAYE AND
CAROLYN JAYE IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA**

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States should grant a Petition For A Writ of Certiorari to the Supreme Court of Alabama to consider a Fourteenth Amendment due process issue when that issue was not properly raised, argued, briefed, or preserved at the state trial court or state supreme court level?

2. Whether the Supreme Court of the United States should grant a Petition For A Writ Of Certiorari to the Supreme Court of Alabama when the Petitioner has failed to present any special and important reasons consistent with Rule 17 of the United States Supreme Court Rules?

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SUPREME COURT OF ALABAMA**

Respondents Wayne Jaye and Carolyn Jaye pray that the Petition For A Writ Of Certiorari be denied for the purposes of reviewing the judgment of the Supreme Court of Alabama entered on June 23, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama affirming the judgment against Petitioner for \$20,000.00 in compensatory damages and \$500,000.00 in punitive damages is reprinted in

Petitioner's Brief, A1-A8. The opinion of the Circuit Court of Tallapoosa County denying Petitioner's post-trial motions is reprinted in Petitioner's Brief, A23-A28.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1257(a).

PROPOSED CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

“...nor shall any State deprive any person of life, liberty, or property without due process of law....”

STATEMENT OF THE CASE

This case involves the Respondents' (Wayne and Carolyn Jaye) purchase of a mobile home ordered from and manufactured by Petitioner Vintage Enterprises, Inc. This home was delivered to the Jayes replete with manufacturing defects known to Vintage at its plant before shipment. The home was priced with options ordered but never provided. Costs were charged to the home on items which the Jayes never ordered.

Petitioner appealed from a jury verdict of \$20,000.00 in compensatory damages and \$500,000.00 in punitive damages entered in favor of the Respondents in the Circuit Court of Tallapoosa County, Dadeville Division, Alabama. The jury also entered a verdict in favor of the co-defendant, James Harold Cantrell (dealer who sold the mobile home to the Jayes). Petitioner appealed from the Tallapoosa County Circuit Court's denial of its post-trial “Motion for Judgment Notwithstanding the Verdict; Motion for New Trial; Motion for Remittitur” (hereinafter referred to as “post-trial motions”).

Vintage was granted an opportunity at a hearing held on July 15, 1988 to present any old, new, or additional evidence to the trial judge in support of its post-trial motions. Under Alabama procedure, in effect at the time, Vintage could have submitted evidence proving that the punitive damage award was excessive or unconstitutional.¹ As the record of this hearing reflects, no sworn testimony was offered by Vintage nor was any verified document offered to establish either the excessiveness or the unconstitutionality of the jury's verdict in this case. Although Petitioner now claims that this jury verdict has caused it to file bankruptcy, Vintage did not present any evidence at this post-trial hearing which substantiated its financial condition. The comptroller of Vintage was present at the hearing but was not called as a witness to testify to Vintage's financial condition. Vintage's only attempt to offer evidence at the hearing was by an uncertified, uncorroborated 1988 Annual Report which the Respondents were not given an opportunity to cross-examine or contest.

The Supreme Court of the State of Alabama affirmed the trial court's denial of these post-trial motions. To this affirmation, Petitioner failed to file any application for rehearing which it was entitled to do under Rule 40 of the Alabama Rules of Appellate Procedure (Appendix A). Subsequently, Vintage filed this Petition for Writ of Certiorari.

Vintage has presented *no* evidence in any legal proceeding which establishes that its alleged bankruptcy was caused by the \$500,000.00 punitive damage award here challenged. Petitioner has paid nothing to the respondents in this case as of the writing of this brief. Yet, Petitioner advances the unfounded argument that this judgment has forced it into bankruptcy.

¹ A review of the transcript of the July 15, 1988 hearing reflects that no constitutional question or issue in general, and the Fourteenth Amendment in particular, was ever argued, briefed or mentioned by Vintage. The trial court's denial of Vintage's post-trial motions did not address the Fourteenth Amendment due process claim.

As early as May 23, 1988, Vintage was representing to its stockholders, and later to the trial court, that it had established reserves sufficient for the "ultimate resolution" of the Jayes' claim. As late as August 29, 1989, a company official was reported as stating to the local newspaper in Henderson, North Carolina:

"We plan to continue both operations," the official said. He estimated that the Henderson plant is worth \$1,500,000.00 and that Vintage Enterprises has an overall annual sales of \$30,000,000.00.

The official stated that he felt "very good" about the future of Vintage. (Appendix B.) Vintage's assertion that this case has forced it into bankruptcy is mere argument on the part of its counsel contradicted by its public statements. Bankruptcy has provided Vintage with a temporary means of escape from the accountability of the judgment entered by the Alabama courts.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

It is not enough that a question in the abstract be worthy of review. The issue is whether, in this particular case, the Petitioner's application is a "cert worthy" question in the proper factual, procedural, and substantive posture. The Fourteenth Amendment due process rights of the Petitioner were not violated in the trial or post-trial proceedings in this case. The substantive and procedural law of the State of Alabama concerning punitive damages in effect for this case more than sufficiently satisfied the Fourteenth Amendment due process rights of Petitioner. Moreover, there were no objections to that law properly preserved below. This case, therefore, does not present the opportunity to resolve any Fourteenth Amendment due process issue relative to punitive damages.

This is not a products liability case affecting the research and development of new products. This is not a prescription drug case affecting the introduction of a new pill or a vaccine into the market place. This is not a design or manufacturing defect case which could cause manufacturers and designers of airplanes, motor vehicles, etc. to suspend or forego new projects for fear of potential liability. This is simply a case about broken promises, deceit, and an intentional misrepresentation and suppression of the truth. For an abbreviated statement of Vintage's fraud proven at trial, reference is made to Judge Bryan's opinion reprinted in Petitioner's Brief, A23-A28.

I. PETITIONER HAS FAILED TO TIMELY AND PROPERLY RAISE, ARGUE, BRIEF, OR PRESERVE ANY FOURTEENTH AMENDMENT ISSUE OF "DUE PROCESS"

The Fourteenth Amendment due process claim of the Petitioner was not properly preserved, argued, briefed or raised in any of the State Court proceedings. The Petitioner failed to

mention the constitutional issue in its answer or amended answer to the Respondents' complaint and did not raise the constitutional issue at the end of the Respondents' case in chief by a motion for directed verdict. The Petitioner failed to offer or make a "showing" on the record of any evidence of its financial worth or the adverse financial impact of a large punitive damage award during the trial. The Petitioner failed to raise any constitutional issue at the close of the evidence in the case and did not object on constitutional grounds to any of the jury charges, in either the pre-charge conference, when the charges were actually given, or after the charges were given. The Petitioner failed to request the trial judge to charge the jury on constitutional grounds that it should consider the financial worth of Vintage or the adverse financial impact on Vintage when determining the amount of punitive damages to award. Due to this failure, Vintage cannot assign as error the trial judge's failure to charge the jury on this issue. ARCP 51 (Appendix C). At the time the jury retired to reach its verdict, no constitutional issue had been raised for the trial jury or judge to consider.

The Petitioner for the first time, after the trial of the case, in its post-trial motions, ambiguously and without specificity suggested a Fourteenth Amendment due process claim. Ground 24 of the Petitioner's written post-trial motions states as follows:

24. The jury verdict awarding punitive damages in this case is violative of the constitutional safeguards provided to the Defendant under the due process clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages generally and in this case in particular are vague and are not rationally related to legitimate government interests.

"Constitutional issues raised for the first time in a motion for new trial come too late for consideration on appeal." *Hicks v. Huggins*, 405 So.2d 1324, 1327 (Ala. Civ. App. 1981) Alabama courts have long required "constitutional issues" to be raised at the *trial on the merits* in order to be preserved on appeal. *Bur-*

ton v. Burton, 379 So.2d 617 (Ala. Civ. App. 1980) Vintage's attempt to raise this constitutional question came too late under Alabama law. *Central Alabama Electric Cooperative v. Tapley*, [MS. 87-1188 May 12, 1989] So.2d (Ala. 1989); *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989).

Even at the post-trial motions hearing before the trial judge, ample opportunity was given Petitioner's counsel to argue the constitutional issue, but no evidence, argument, or effort was made to preserve, raise, or even mention this issue. By this neglect, the Petitioner has waived the Fourteenth Amendment constitutional argument advanced to this Court. Significantly, the Petitioner failed to properly argue a Fourteenth Amendment due process claim in either its brief or reply brief to the Supreme Court of Alabama.

On page 44 of Petitioner's brief to the Supreme Court of Alabama, Vintage for the first and only time, quotes another case mentioning the Fourteenth Amendment:

In addition, "the lack of sufficient standards governing punitive damage awards in Alabama violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 6 of the Constitution of Alabama of 1901." *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1061 (Ala. 1987) (Houston, J., concurring specially).

This vague reference to the Fourteenth Amendment was insufficient to preserve this issue before the Alabama Supreme Court [*Conley v. Beaver*, 437 So.2d 1267 (Ala. 1983)], and it most certainly is not enough to preserve the issue before this Court for a Writ of Certiorari. *Borden's Farm Products Co. v. Baldwin*, 55 S. Ct. 187, 293 U.S. 194 (1934). Moreover, Petitioner did not file a motion for rehearing on any issue before the Alabama Supreme Court as allowed under Rule 40 of the Alabama Rules of Appellate Procedure.

In *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), this Court discussed but did not reach the constitutional due process issue on punitive damage awards because it was not properly raised or preserved in the Mississippi state courts. Vintage, in its post-trial motions, Ground 24, mentioned "due process" but failed to preserve any assignment of error relating to the absence of due process "standards". Questions which merely lurk in the record and are not brought to the Court's attention or ruled on are not considered as having been so decided. *Bingham v. U.S.*, 56 S. Ct. 180, 296 U.S. 211 (1935). This Court has repeatedly refused to consider cases in which the "...alleged defect was not pleaded or brought to the attention of either of the courts below". *Wiliser v. U.S.*, 54 S. Ct. 840, 847, 292 U.S. 571 (1934); *New York Rock Co. v. Poznan*, 47 S. Ct. 482, 485, 274 U.S. 117 (1927); *Alexander v. Corden Pipe*, 54 S. Ct. 292, 293 (1934). This court stated in *Aircraft and Diesel Equipment Corp. v. Hirsch*, 67 S. Ct. 1493, 1498, 331 U.S. 752, 763 (1947) "...constitutional questions are not to be entertained upon dubious presentations, or when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably". [See also *Government and Civic Emp. Organizing Committee, CID, v. Windsor*, 77 S. Ct. 838, 353 U.S. 364 (1957): Federal courts will not pass upon constitutional questions presented in the abstract rather than in concrete form; *Borden's Farm Products Co.*, *supra*: Mere general allegation of a violation of due process and equal protection clauses is insufficient and not enough to properly preserve the issue on appeal.] In *Baker v. Carr*, 369 U.S. 186 (1962), this Court emphasized the importance of counsel who "...sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. at 204.

Additionally, questions two and three presented in Petitioner's brief to this Court were never raised in the State Court below. These questions, therefore, should not be considered by this court.

**II. PETITIONER HAS FAILED TO PRESENT ANY
“SPECIAL AND IMPORTANT REASON” CONSIS-
TENT WITH RULE 17 OF THE UNITED STATES
SUPREME COURT RULES**

**A. PETITIONER HAS FAILED, IN THIS PAR-
TICULAR CASE WITH ITS PARTICULAR
FACTS, TO PRESENT ANY “IMPORTANT
QUESTION” OF FEDERAL LAW WHICH THIS
COURT SHOULD SETTLE [United States Supreme
Court Rule 17.1(c)].**

Assuming Vintage has preserved the “due process” issue, Alabama had at the time of trial and subsequent appeal a well-defined set of guidelines which protected Vintage’s due process rights. There is, therefore, no “important question” of federal law which this Court should settle.

Factors have been developed by the Supreme Court of Alabama as standards for the courts throughout the state to follow in assessing punitive damage verdicts. These factors are guidelines for the trial and appellate judges to consider in determining the amount that is proper punishment and proper deterrence within the facts of each particular case. In Alabama, punitive damage verdicts are not frivolous, standardless, or lacking the usual controls of instructions and judicial review under these standards. No more concrete or relevant factors could be constitutionally compelled for the protection of a defendant’s rights under the Due Process Clause of the Fourteenth Amendment than the following:

1. The culpability of the Defendant’s conduct.
2. The desirability of discouraging others from similar conduct.
3. The impact upon the parties.
4. The impact upon innocent third parties.

5. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

6. The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

7. If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

8. The financial position of the defendant is relevant (see #3 above).

9. All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

10. If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

11. If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

These factors or guidelines were matters of established state law at the time the Supreme Court of Alabama affirmed the jury verdict in this case. *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986) and *Green Oil Company v. Hornsby*, 539 So.2d 218, 223 (Ala. 1989).

**B. PETITIONER HAS FAILED TO PRESENT ANY
“IMPORTANT QUESTION” OF FEDERAL LAW
WHICH HAS BEEN DECIDED BY THE STATE
COURTS OF ALABAMA [United States Supreme
Court Rule 17.1(c)]**

This Court cannot ascertain whether or not the Supreme Court of Alabama considered the Fourteenth Amendment due process question when only passing reference was made to the case of *Industrial Chemical & Fiberglass Corporation v. Chandler*, [MS. 88-381, - 385, June 23, 1989] ____ So.2d ____ (Ala. 1989) (on rehearing) in its opinion affirming the trial court's judgment herein. It is mere speculation on the part of Vintage to suggest that the Supreme Court of Alabama ruled that the verdict in this case met the constitutional requirements of the Fourteenth Amendment. It would be speculation on the part of the Respondents to suggest to this Court that the Supreme Court of Alabama did not address this constitutional question. There was, however, a procedural safeguard available to Vintage (which it did not use) that would have required the Supreme Court of Alabama to address the constitutional issue. By Vintage's failure to apply for rehearing after the Supreme Court ruled on June 23, 1989, Vintage failed to establish whether or not the Supreme Court of Alabama had decided this important question of federal law. By this failure, Vintage did not avail itself of all the remedies and due process rights granted it under Alabama law. Procedurally, this is not a proper case for certiorari to be granted.

CONCLUSION

As Respondents have demonstrated, no grounds exist on which a writ of certiorari should be granted. After exhaustive post-trial review, a unanimous Alabama Supreme Court affirmed the award of punitive damages in this case. After affirmance, Petitioner did not file a motion for rehearing raising due process violations and issues.

This case involves punitive damages which were affirmed after considering many standards/guidelines of fundamental fairness and subject to stringent review with a special *de novo* hearing before the trial judge on the punitive damage question. Afterwards, the trial court's decision was meticulously reviewed by the Supreme Court of Alabama. Such attention and effort put forth by these Courts is entitled to great deference. The due process issue was not properly preserved, never specifically briefed or argued on appeal, and was never expressly decided by either the trial court or the Supreme Court of Alabama.

Respondents agree with Vintage in its brief requesting Petition For Writ of Certiorari when it states:

Nor does Vintage suggest that it would be wise or proper for this Court to draft uniform punitive damages law for the fifty states. Such an approach would not only violate the states' right to establish their own law, but would also preclude the state-by-state experimentation prized under our federalist system. (Vintage brief, pages 9-10.)

Having admitted that it would not be wise for this Court to become involved in this "states' rights" arena, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Alabama Rules of Appellate Procedure

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)— or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)—after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court. (Amended effective April 1, 1984.)

APPENDIX B

HENDERSON, NORTH CAROLINA *DAILY DISPATCH*

(August 29, 1989 edition)

OWNER SAYS PARKWAY OPERATING DAY-TO-DAY

No One Laid Off As Company Reorganizes

By AL WHELESS
Daily Dispatch Writer

Parkway Homes, a mobile home manufacturing plant with 125 employees and a \$2 million annual payroll in Henderson, is under the shadow of a Chapter 11 bankruptcy filing.

An administrative official said this morning that any layoffs at the plant on State Road 1216 are being determined on a day-by-day basis. There are no plans at this point to lay off anyone, the official said.

The plant turns out about 500 mobile homes a year with annual sales of about \$15 million, according to John M. Beddow, president and chief executive officer of Vintage Enterprises Inc. of Atlanta, the parent company of Parkway.

Vintage Enterprises put up Parkway as an asset to meet a \$650,000 appeals bond. Last June, the Alabama Supreme Court upheld a lower court's award of \$20,000 in actual damages and \$500,000 in punitive damages against Vintage Enterprises, which also owns a mobile home plant in Gainesville, Ga.

Beddow said this morning that the entire company is affected by a warranty lawsuit filed in Alabama several years ago by plaintiffs known as the Jayes. Vintage Enterprises filed for

Chapter 11 in a federal court in Alabama and has yet to be appointed a trustee while the company appeals its case to the U.S. Supreme Court, according to Beddow.

He said Vintage Enterprises is expected to file a reorganizational plan with its trustee in the next couple of months. Asked how he felt about the future of Parkway and its parent company under Chapter 11, Beddow replied, "Very good." Parkway "has a long history in Henderson and hopes to continue that relationship," he said.

The Henderson plant has been in operation for 27 years.

Parkway's day-to-day operations will depend heavily upon its customers, suppliers and the local community, Beddow added.

The warranty suit was based on repairs to a mobile home which the company valued at \$1,000 and which the plaintiffs estimated were worth \$3,000, according to Beddow. In Alabama, he said, there is no limit on punitive damage awards in civil suits.

He said the Chapter 11 filing provides "time" for Vintage Enterprises to appeal the judgment, and permits it "to complete steps designed to return the company to profitability."

Vintage Enterprises hopes the U.S. Supreme Court will review and reverse the punitive damages award, Beddow said, but intends to propose a reorganization plan regardless of the decision by the high court.

"We plan to continue both operations," Beddow said. He estimated that the Henderson plant is worth \$1.5 million, and that Vintage Enterprises has overall annual sales of \$30 million.

APPENDIX C

Alabama Rules of Civil Procedure

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file and, in such event, shall serve on all opposing parties written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The judge shall write "given" or "refused" as the case may be, on the request which thereby becomes a part of the record. Those requests marked "given" shall be read to the jury without reference as to which party filed the request. Neither the pleadings nor "given" written instructions shall go into the jury room. Every oral charge shall be taken down by the court reporter as it is delivered to the jury. The refusal of a requested, written instruction, although a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in charges given at the request of the parties. *No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection.* (emphasis added) Submission of additional explanatory instructions shall not be required unless requested by the court. Additional instructions shall be submitted in writing, except that with respect to any additional instruction taken from Alabama Pattern Jury Instructions, it shall be sufficient to identify said instruction on the record by reference to the number and title of said pattern jury instruction. Opportunity shall be given to make the objection out of the hearing of the jury. In charging the jury, the judge shall not express his opinion of the evidence. (Amended effective March 1, 1984.)

